

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

IN RE:)	CHAPTER 7
)	
JOHN & JULIE HOFFMAN,)	
)	
)	CASE NO. 06-70231
)	
DEBTORS.)	

MEMORANDUM DECISION

The matter before the Court is the Motion for Approval of a Reaffirmation Agreement filed June 20, 2006 in which the Debtors request the Court enter an order approving the reaffirmation agreement executed by the Debtors and Salem VA Medical Center Federal Credit Union pursuant to 11 U.S.C. § 524(d). For the reasons noted below, the Court concludes that the Motion should be denied.

FINDINGS OF FACT

On March 23, 2006, the Debtors filed a voluntary joint petition for relief under Chapter 7 of the Bankruptcy Code. On the same date, the Debtors filed a Statement of Intention in which they indicated their plan to reaffirm the debt owed to Salem VA Medical Center Federal Credit Union (“Salem Federal Credit Union”) secured by a 1999 Dodge Caravan. Salem Federal Credit Union was listed on the Debtors’ Schedule D with a claim in the amount of

\$11,500.00 secured by a lien on the title to a 1999 Dodge Caravan valued at \$5,125.00.¹ The Debtors' total combined monthly income was reported on Schedule I as \$4,799.12 and their total monthly expenses was reported on Schedule J as \$4,835.00; resulting in a negative monthly balance of \$35.87.

On June 6, 2006, the Chapter 7 Trustee filed a No Asset Report. The Debtors filed the Motion for Approval of a Reaffirmation Agreement on June 20, 2006 and scheduled it for hearing on July 24, 2006. A copy of the Reaffirmation Agreement filed with the Court is attached hereto as Exhibit A and is incorporated by reference. The Reaffirmation Agreement was signed by the Debtors on June 2, 2006. Pursuant to the Reaffirmation Agreement, the Debtors agreed to reaffirm their debt to Salem Federal Credit Union in the total amount of \$10,887.86.² The Debtors agreed to repay this amount with interest at 12.25% by making biweekly payments of \$192.00 to the credit union. Part D of the Reaffirmation Agreement contains the Debtors' Statement in Support of Reaffirmation Agreement. The Debtors approved the following statement, which is intended for use if the creditor is a credit union and the debtors are represented by an attorney during the negotiation of the reaffirmation agreement³, by signing below it:

¹ Schedule D provides that the debt was incurred "around" September 2004.

² The credit union's debt remained secured by a lien on the Debtors' 1999 Dodge Caravan.

³ Part C of the Reaffirmation Agreement, which is a certification by the Debtors' counsel that the Debtors' agreement was fully informed and voluntary; the agreement does not impose an undue hardship on the Debtors or the Debtors' dependents; and counsel advised the Debtors of the legal effect and consequences of reaffirmation, was not completed. This is consistent with the statements made at the July 24, 2006 hearing by the Debtors' counsel that he did not represent the Debtors in negotiating the reaffirmation agreement with Salem Federal Credit Union.

I believe this reaffirmation agreement is in my financial interest. I can afford to make the payments on the reaffirmed debt. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

Signed: /s/ John Patrick Hoffman

/s/ Julie Hoffman

Date: 6-1-06

(Debtors' Reaffirmation Agreement 8.) The Reaffirmation Agreement was not accompanied by a statement in accordance with Interim Federal Rule of Bankruptcy Procedure 4008.

A hearing was held on the Debtors' Motion on July 24, 2006 at which counsel for the Debtors and the male Debtor, John Hoffman, were present. Counsel for the Debtors explained that he was not willing to approve the reaffirmation agreement based on the Debtors' Schedule J showing a negative monthly budget and was, therefore, requesting the Court to approve the reaffirmation agreement. The male Debtor testified that the Debtors are current in their payments to Salem Federal Credit Union and that the Debtors have four years left on the loan. Mr. Hoffman stated that the payoff balance on the loan was \$10,600.00 as of July 21, 2006 and that he understood that the vehicle was worth less than what was owed on it. He explained that the Debtors desire to reaffirm this debt is primarily because the female Debtor's mother is a co-signor on the loan. When asked about changes in the Debtors' budget, Mr. Hoffman advised the Court that the only change in their budget was that the mortgage company had foreclosed on their house after filing bankruptcy.⁴ Consequently, the Debtors' budget no longer provided for payments to the mortgage company. As a result of the foreclosure, Mr. Hoffman is currently

⁴ PHH Mortgage Corporation filed a Motion for Relief from the Automatic Stay on March 29, 2006 alleging that the Debtors were in default two monthly payments of \$775.00. On April 12, 2006, the Court entered a default order granting PHH Mortgage relief from the automatic stay.

living with his parents and spending approximately \$600 per month on housing.⁵

CONCLUSIONS OF LAW

This Court has jurisdiction of this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. The Court's approval or disapproval of a reaffirmation agreement is a "core" bankruptcy matter pursuant to 28 U.S.C. § 157(b)(2)(I) and (O).

The enforceability of a reaffirmation agreement is governed by 11 U.S.C. § 524. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amended the provisions of § 524 with respect to reaffirmation agreements for consumer debts in cases filed on or after October 17, 2005. This case was filed on March 23, 2006. Accordingly, the provisions of BAPCPA regarding reaffirmation agreements apply in this case.

For a reaffirmation agreement to be enforceable, the agreement must satisfy the requirements of § 524(c). In a case in which the debtor is an individual "who was not represented by an attorney during the course of negotiating [the reaffirmation] agreement," the Court must hold a hearing pursuant to § 524(d). If the debt to be reaffirmed is not based in whole or in part on a consumer debt secured by real property, the Court must determine whether to approve the reaffirmation agreement under § 524(c)(6)(A) as "(I) not imposing an undue hardship on the debtor or a dependent of the debtor; and (ii) in the best interest of the debtor."

⁵ Pursuant to Schedule J, the Debtors maintain separate households. Each Debtor reported a \$500 monthly rent or mortgage payment.

Section 524(k) is a new subsection of § 524 added by BAPCPA. It sets out mandatory components of a reaffirmation agreement, which must be filed with the court in order for the reaffirmation agreement to be enforceable under § 523(c). One such component set forth in § 524(k)(3)(J) requires that the following statements be included in the reaffirmation agreement:

2. Complete and sign Part D and be sure you can afford to make the payments you are agreeing to make and have received a copy of the disclosure statement and a completed and signed reaffirmation agreement.

3. If you were represented by an attorney during the negotiation of your reaffirmation agreement, the attorney must have signed the certification in Part C.

4. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, you must have completed and signed Part E.

. . . .
. . . .

7. If you were not represented by an attorney during the negotiation of your reaffirmation agreement, it will not be effective unless the court approves it. The court will notify you of the hearing on your reaffirmation agreement. You must attend this hearing in bankruptcy court where the judge will review your reaffirmation agreement. The bankruptcy court must approve your reaffirmation agreement as consistent with your best interests

11 U.S.C. § 524(k)(3)(J)(I). Consequently, “[i]f the reaffirmation agreement does not contain the attorney’s certification, the agreement is not enforceable unless there is also a motion for court approval, in which case a hearing will be scheduled.” *In re Donald*, No. 06-00100-5-ATS, 2006 Bankr. LEXIS 1035, at *5-6 (Bankr. E.D. N.C. June 12, 2006).

In this case, the attorney’s certification was not filed. However, the attorney who represented the Debtors in their Chapter 7 bankruptcy case did file a Motion for Approval of a Reaffirmation Agreement and scheduled it for hearing. The Court concludes for the purpose of

this decision⁶ that although the Debtors have been represented by their attorney in connection with the Motion for Approval, the Debtors were not represented by their attorney during the course of the negotiation of the reaffirmation agreement with Salem Federal Credit Union. Pursuant to § 524(d), the Court must now decide whether the reaffirmation agreement is in the Debtors' best interest under § 524(c)(6)(A)(ii).

As noted above, the Debtors were instructed to complete Part D of the reaffirmation agreement, which contains the debtor's statement in support of the reaffirmation agreement. Section 524(k)(6)(A) requires the debtor to compute whether the debtor has sufficient disposable income to make the payments required under the reaffirmation agreement and if not, to explain how the debtor can afford to make the payments. In this case, the Debtors did not properly complete Part D. The Debtors did not demonstrate that they could afford to make the payments required under the reaffirmation agreement. Instead, the Debtors signed the statement intended for a debtor represented by an attorney in negotiating the reaffirmation agreement with a credit union. The Debtors negotiated the reaffirmation agreement with Salem Federal Credit Union without being represented by the attorney who represented them in their

⁶ The Court notes that there are two possible interpretations of the language regarding a bankruptcy debtor's legal representation "during the course of negotiating" a proposed reaffirmation agreement. One, which is the interpretation advanced by Debtors' counsel in the present matter, is that the debtor was not represented by counsel with specific respect to the actual negotiation, if any, of such agreement. When the reaffirmation is simply re-assumption of legal liability for the existing contract, it is not clear what actual "negotiation" there might be in such process. The other interpretation is that the debtor was not represented by counsel during the time that such agreement was made. The Court notes that the first interpretation offers a powerful incentive to debtors' counsel in cases anywhere near the borderline to stand aside from exercising personal responsibility to sign or decline to sign the certification required of counsel to make such agreements enforceable and pass the matter on to the court for its resolution. Accordingly, by ruling in the present case when no argument has been requested or offered on the issue, the Court does not intend to create a precedential decision thereon.

Chapter 7 bankruptcy case. Accordingly, the Debtors should have completed the section of Part D which states:

1. I believe this reaffirmation agreement will not impose an undue hardship on my dependents or me. I can afford to make the payments on the reaffirmed debt because my monthly income (take home pay plus any other income received) is \$ ---, and my actual current monthly expenses including monthly payments on post-bankruptcy debt and other reaffirmation agreements total \$ ---, leaving \$ --- to make the required payments on this reaffirmed. I understand that if my income less my monthly expenses does not leave enough to make the payments, this reaffirmation agreement is presumed to be an undue hardship on me and must be reviewed by the court. However this presumption may be overcome if I explain to the satisfaction of the court how I can afford to make the payments here: ---.

2. I received a copy of the Reaffirmation Disclosure Statement in Part A and a completed and signed reaffirmation agreement.

11 U.S.C. § 524(k)(6)(A). Furthermore, the Debtors should have filed with the reaffirmation agreement a statement of their total income and total expenses pursuant to Interim Federal Rule of Bankruptcy Procedure 4008. It states, in pertinent part:

The debtor's statement required under § 524(k) shall be accompanied by a statement of the total income and total expense amounts stated on schedules I and J. If there is a difference between the income and expense amounts stated on schedules I and J and the statement required under § 524(k), the accompanying statement shall include an explanation of any difference.

Interim Fed. R. Bankr. P. 4008.

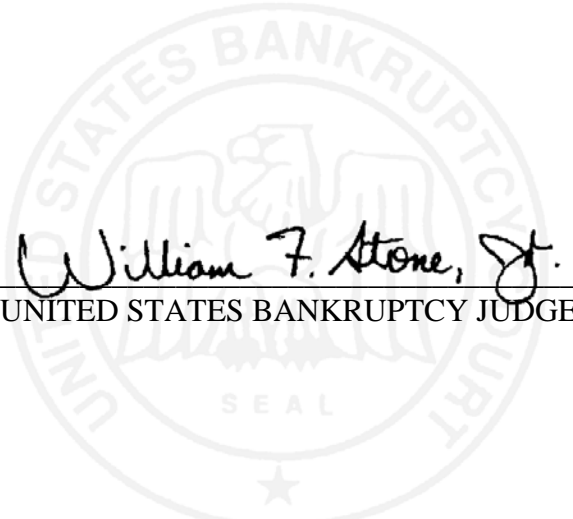
The evidence before the Court does not support the conclusion that the Debtors can afford to make the payments required under the reaffirmation agreement. Schedule J shows expenses of \$4,835.00 and income of \$4,799.13 for a monthly deficient of \$35.87. This monthly deficient is possibly larger now than at the time of filing as Schedule I states "Mrs. Hoffman's income will be reduced by approximately \$2,000.00 per month due to a change in employers." Mr. Hoffman testified that he is currently spending \$600 per month on housing, an amount \$100

higher than the \$500 mortgage payment provided for on Schedule J.

Mr. Hoffman explained that the Debtors wanted to reaffirm this debt with Salem Federal Credit Union to protect the female Debtor's mother, who is a co-signor on the loan, in the event that the Debtors defaulted on the loan. While the Court acknowledges and understands the family dynamic involved, it concludes that the reaffirmation agreement is not in the Debtors' best interest. The only value of the vehicle involved in this case appears on the Debtors' Schedule D, where the Debtors value the vehicle at \$5,125.00. Pursuant to the Reaffirmation Agreement, the total amount of debt to be reaffirmed by the Debtors is \$10,887.86. Agreeing to repay more than twice the vehicle's value does not make economic sense for the Debtors. The Court cannot determine any financial benefits that the Debtors will enjoy by approving this Reaffirmation Agreement and concludes that their understandable and commendable desire to protect Mrs. Hoffman's mother is not sufficient to make their willingness to reaffirm legal liability for their discharged debt to the credit union to be in their best interest. Not approving the Reaffirmation Agreement does not necessarily mean that the Debtors will lose their vehicle or that Mrs. Hoffman's mother will be faced with a demand for payment with the threat of legal action should she fail to do so. Section 524(f) specifically allows the Debtors to continue making voluntary payments to Salem Federal Credit Union. While this Court of course cannot predict Salem Federal Credit Union's future decisions, there seems to be no reason why it would not decide that it is in its own best interest to permit the Debtors to continue making the contractual payments on the loan, which continues to be secured by collateral worth less than its loan balance, while maintaining its existing contractual claim against Mrs. Hoffman's mother. Such a decision would not only serve to preserve its existing favorable customer relationships but also

recognize that the Hoffmans have done all within their power to reaffirm the debt.⁷ If it decides otherwise, that possibility is not one which is adequate to persuade the Court that reaffirmation of the debt is in the best interest of the Debtors, if they can afford it at all. For the foregoing reasons, the Court finds that approving the Reaffirmation Agreement would impose an undue hardship on the Debtors and their dependents and would not be in the best interests of the Debtors. Accordingly, an order in accordance with the provisions of this Memorandum Decision shall be entered contemporaneously herewith.

This 4th day of August, 2006.

The seal of the United States Bankruptcy Court is visible in the background. It is a circular seal with the words "UNITED STATES BANKRUPTCY COURT" around the top and "SEAL" at the bottom. In the center is an eagle with spread wings, perched on a shield. A star is at the bottom center.
William F. Stone, Jr.
UNITED STATES BANKRUPTCY JUDGE

⁷ There is no reason for the Court at this point to consider the intricate arguments reviewed by United States Bankruptcy Judge A. Thomas Small in his decision in *In re Donald*, 2006 Bankr. LEXIS 1035, regarding a secured creditor's rights against collateral or co-obligors in situations where a bankruptcy debtor states his intention to reaffirm a debt, proceeds to make an agreement to do so, and continues to maintain the secured loan in a current status, but the reaffirmation agreement is not enforceable due to the bankruptcy court's refusal to approve it, something beyond the debtor's control.